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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1967~~ 1968

No. ~~1209~~ 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit.

APPENDIX

BARNABAS F. SEARS,
WAYLAND B. CEDARQUIST,
MAURICE J. McCARTHY,
33 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Petitioner.

INDEX TO APPENDIX

PAGE

APPENDIX A—

District Court Proceedings	1-18
(1) Prefix to Record	1
(2) Indictment	2-3
(3) Transcript of Proceedings, April 14, 1966	4-5
(4) Transcript of Proceedings, June 29, 1966	5-6
(5) Transcript of Proceedings, July 15, 1966	6-8
(6) Transcript of Proceedings, September 14, 1966	9-16
(7) Judgment and Commitment Order	17
(8) Notice of Appeal	18

APPENDIX B—

Appellate Court Proceedings	19-28
(1) Opinion of the Court of Appeals for the Seventh Circuit, entered January 10, 1968	19-27
(2) Judgment of the Court of Appeals for the Seventh Circuit, entered January 10, 1968	28
(3) Order of the Court of Appeals for the Seventh Circuit, entered February 5, 1968, denying rehearing	28

APPENDIX C—

Order of the Supreme Court of the United States, entered April 29, 1968, allowing Certiorari	29
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APPENDIX D—

Constitutional Provisions, Statutes and Federal Rules Involved	30-31
(1) Amendment V, United States Constitution	30
(2) Amendment VI, United States Constitution	30
(3) Title 26, United States Code §7201.....	31
(4) Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 11 ..	31

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs. *

WILLIAM J. MCCARTHY,

Defendant.

No. 66 CR 209

PREFIX TO RECORD

1. Suit was commenced by return of an indictment consisting of three Counts on April 1, 1966, entitled as above, and naming William J. McCarthy as the sole defendant.
2. On April 14, 1966, the defendant pleaded not guilty to each Count, and a trial date was set.
3. On July 15, 1966, the defendant withdrew his plea of not guilty to Count II of the indictment and entered a plea of guilty thereto. On Motion of the Government, Counts I and III were dismissed. The cause was referred to the Probation Office for Pre-Sentence Investigation.
4. On September 14, 1966, the Court entered its judgment and sentence.
5. On September 23, 1966, the defendant filed a Notice of Appeal.

2

INDICTMENT

(Caption omitted in printing)

Count One.

The March 1966 Grand Jury charges:

That on or about the 14th day of April 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1959, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of \$15,256.27 and that the amount of tax due and owing thereon was the sum of \$3,696.88, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of \$18,075.35, upon which said taxable income he owed to the United States of America an income tax of \$4,625.62; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

3

Count Two.

The March 1966 Grand Jury further charges:

That on or about the 29th day of March, 1961, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1960, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return

wherein he stated that his taxable income for said calendar year was the sum of \$16,804.59 and that the amount of tax due and owing thereon was the sum of \$4,193.56, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of \$29,738.85, upon which said taxable income he owed to the United States of America an income tax of \$9,337.26; in violation of Section 7201, Internal Revenue Code: Title 26, United States Code, Section 7201.

4

Count Three..

The March 1966 Grand Jury further charges:

That on or about the 13th day of April, 1962, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William J. McCarthy, defendant, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1961, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Illinois, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of \$2,784.27 and that the amount of tax due and owing thereon was the sum of \$556.85, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of \$8,322.96, upon which said taxable income he owed to the United States of America an income tax of \$1,763.97; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

A True Bill:

/s/ Oliver Blackinton
Foreman

/s/ Edward V. Hanrahan
United States Attorney

49

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on April 14, 1966, at 10:00 o'clock, a.m.

Present:

Hon. Edward V. Hanrahan,
United States Attorney

By: Mr. Robert A. Galbraith,
on behalf of the Government;
Mr. Bernard H. Sokol,
on behalf of the Defendant.

50 * The Clerk: 66 CR 209, United States v. William McCarthy, arraignment and plea.

Mr. Sokol: We will waive reading of the indictment. I haven't yet received a copy of it.

The Court: You had better not waive reading it until you have received a copy.

Mr. Sokol: I now acknowledge having received it and we will, in behalf of the defendant, enter a plea of not guilty, if the Court please.

Mr. Galbraith: Your Honor, for your information, this is a three-count indictment charging the evasion of income taxes for calendar years 1959, '60 and '61.

The Court: How soon will you be ready for trial?

Mr. Sokol: I don't contemplate any preliminary motions because I have already had some discussions with Mr. Galbraith, so I have an idea of what amounts are involved. Perhaps June?

The Court: All right, I had June in mind. June 13th?

Mr. Sokol: 13th is fine.

The Court: That is on a Monday and not a Friday.

51 Mr. Sokol: Fine. Thank you, your Honor.

(Which were all the proceedings had and taken in the above-entitled cause on the day and date aforesaid).

52 Certificate of Official Court Reporter.

53 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 29, 1966, at 10:00 a.m.

Present:

Hon. Edward V. Hanrahan,
United States Attorney,

By: Mr. Robert A. Galbraith,
on behalf of the Government.

54 The Clerk: 66 CR 209, U.S. v. William J. McCarthy, motion of the Government to reset trial date from June 30 to July 15th.

Mr. Galbraith: Good morning, your Honor. This is the matter that I discussed with you the other day and it arises out of the defendant's illness. This is an income tax case.

The Court: How long will the trial take?

Mr. Galbraith: Well, it is anticipated the matter will not go to trial, according to counsel.

The Court: When is it set for?

Mr. Galbraith: It is presently set for tomorrow. We are asking it to be set July 15th.

The Court: That will be the order.

(Which were all the proceedings had and taken in the above-entitled cause on the day and date aforesaid.)

55 Certificate of Official Court Reporter.

38 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois, on Friday, July 15, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,

By: Mr. Patrick J. Hughes,
Assistant United States District Attorney,
on behalf of the government;
Mr. Bernard Sokol,
on behalf of the defendant.

39 The Clerk: 66 CR 209, U.S.A. vs. William J. McCarthy, trial.

Mr. Sokol: Good morning, your Honor. This matter was set over because of my inability to appear.

The Court: What case is this? I don't even know.

Mr. Sokol: This is United States vs. William J. McCarthy, 66 CR 209, a tax fraud case.

The Court: It was set over for arraignment or what?

Mr. Sokol: No, set over for trial. At arraignment, a plea of not guilty was entered to all three Counts. Mr. Galbraith then appeared for the United States. Mr. Hughes now appears today.

If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

40 The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and \$10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

41 The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of \$10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

42 Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

43 Certificate of Official Court Reporter.

24 **TRANSCRIPT OF PROCEEDINGS**

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Wednesday, September 14, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,

By: Mr. Robert A. Galbraith,
Assistant United States District Attorney;
on behalf of the government;

Sokol, Schwab & Angram,

By: Mr. Bernard A. Sokol,
on behalf of the defendant;

Probation Officer Joseph Sanculius

25 The Clerk: 66 CR 209, United States vs. William J. McCarthy, disposition report on Count 2.

Mr. Galbraith: Good morning, your Honor.

The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?

Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.

The Court: And you, Mr. Sokol, on his behalf, have you something to say?

Mr. Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been given an opportunity to submit a good deal of ma-

terial to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—
26 I don't know truly what I could add except to indicate that he is completely contrite.

The Court: And you, Mr. Galbraith?

Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. The prime consideration of that was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes.

Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable. Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined \$2,500.

Mr. Sokol: Your Honor, may I please ask that
27 the sentence itself be suspended? I would like to, if I may, be heard.

The Court: I will be happy to hear you.

Mr. Sokol: Thank you.

If the Court please, apart from the wrecking of his physical health that has attended a number of the

problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

28 When I spoke with Mr. Sanculius, I knew that we had given to him some reference to the fact and some attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the manner in which the books were kept was not inadvertent.

Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail.

29 When a man is neglectful and adopts a kind of a devious way of secreting himself from the government, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, "You have to put yourself under the jurisdiction of your brother," and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that he could look out for
30 himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to face himself—and this had nothing to do with the

government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, "Oh, yes."

In other words, he does not run away if he is faced with it, but that he himself be guided there.

31 Your Honor, at the age of sixty-five, particularly with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor.

Officer Sanculius: Your Honor, may I say a word.

The Court: Yes, Officer.

Officer Sanculius: Your Honor, I just wondered
32 whether you had received the additional—

The Court: Even if he had not got that pardon anything that happened that long ago has no bearing on what I have done.

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. I have known people to get in and out of that club, you know, about every six months. They become a member and cease to be a member and then they become a member.

Mr. Sokol: Your Honor, could your Honor please entertain my motion and try him, please? I am sure that perhaps he can indicate to the Court how much he wants to make good.

The Court: I am sure that he does. Everybody that is confronted with what he is confronted with here has that desire. I feel certain that that is the fact. However, I think that having—

Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of
33 what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Ingram, my associate counsel
34 in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accompli.

There is no aspect of his existence right now where he has not said, "I am wrong and I need guidance and I will do what somebody else says."

So whether it relates to the matter of drinking, he is with AA; if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture.

The big thing, I think, is that so far as accountability to his government is concerned, that before this indictment took place, he had already put him-

self into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystalized, and they were submitted.

The Court: All right, the sentence heretofore entered is not vacated; a year in the custody of the Attorney General and \$2,500 fine.

35 Mr. Sokol: May we have a stay of execution for ten days, if the Court please.

The Court: Execution for ten days.

The Marshal: He is to surrender to the Marshal at noon on the tenth day?

The Court: Surrender to the Marshal on the 26th day of September at noon.

Defendant McCarthy: Your Honor, could I make a little statement, please.

The Court: What? I cannot hear you.

Defendant McCarthy: I'm handling the printing of the ballots for the County at the moment. It is going into the hands of Mr. Barrett and will take at least fifteen days. I handle it myself personally and it will take fifteen days to complete it.

The Court: I will extend the stay of execution until noon on the 30th of September, which is sixteen days. Noon on the 30th of September you are to surrender to the Marshal.

(Which were all of the proceedings taken and had in the above-entitled cause on the above-mentioned date.)

36 Certificate of Official Court Reporter.

18 JUDGMENT AND COMMITMENT ORDER, entered September 14, 1966:

On this 14th day of September, 1966 came the attorney for the government and the defendant appeared in person and by Counsel.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of Income Tax Evasion in violation of Section 7201, Internal Revenue Code; Title 26, United States Code Section 7201 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year.

It Is Further Ordered and Adjudged that the defendant forfeit and pay to the United States of America a fine in the sum of Two Thousand Five Hundred Dollars (\$2,500.00) and costs.

On motion of defendant, execution stayed until September 30, 1966 at 12 o'clock noon and defendant's bond to stand.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ R. B. Austin

United States District Judge

20 NOTICE OF APPEAL, filed September 23, 1966:

Name and Address of Appellant:

**William J. McCarthy
6245 North Lemont Avenue
Chicago, Illinois**

Name and Address of Appellant's Attorney:

**Maurice J. McCarthy
Boodell, Sears, Foster, Sugrue & Crowley
33 North LaSalle Street
Chicago, Illinois 60602**

Offense:

**Violation: Section 7201, Title 26, United States Code;
Willful attempt to evade or defeat any tax imposed
by Title 26, United States Code.**

**Concise Statement of Judgment or Sentence and Date
thereof:**

**Appellant sentenced to custody of Attorney General
for a period of one year and fined the sum of \$2500.00,
September 14, 1966.**

Name of Prison Where Now Confined, If Not On Bail:

Appellant at large on Bond.

**I, the above named appellant, hereby appeal to the
United States Court of Appeals for the Seventh Circuit
from the above mentioned judgment.**

**/s/ William J. McCarthy
/s/ Boodell, Sears, Foster,
Sugrue & Crowley**

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 15929 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM J. MCCARTHY,

Defendant-Appellant.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

January 10, 1968

Before MAJOR, *Senior Circuit Judge*, and SCHNACKEN-
BERG and SWYGERT, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. William J. McCarthy, defendant, has appealed from a judgment of the district court, convicting him, on his plea of guilty, of a violation of § 7201 of the Internal Revenue Code (26 U.S.C. § 7201), as charged in an indictment, upon which he was given a prison sentence of one year and ordered to pay a fine of \$2500 and costs.

The first question raised here is whether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure,¹ and the second is whether the court abused its discretion in entering

¹ 18 U.S.C.A. Rule 11, which provides:

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining

judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge. Lastly an issue is raised as to whether the court denied defendant his rights under the fifth and sixth amendments to the constitution, by entering judgment without any basis for a determination that the defendant understood the nature of the charge.

The grand jury, in count II, charged that defendant wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him for the calendar year 1960, by filing and causing to be filed a false and fraudulent income tax return stating his taxable income was \$16,804.59 and the tax due was \$4,193.56, whereas, as he then and there well knew, they were \$29,738.85 and \$9,337.26, respectively, in violation of said § 7201.

On April 14, 1966, government attorney Galbraith and attorney Sokol, representing defendant, together with defendant, appeared in court and a plea of not guilty was entered. The cause was then set for trial on June 13, 1966.¹

When the case was called for trial on July 15, 1966, there were present defendant's counsel Sokol and government attorney Hughes, as well as defendant. The following proceedings then occurred:

Mr. Sokol: * * * If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

The Court: Is that satisfactory to the government?

¹ (Continued)

that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

² A succession of postponements was thereafter ordered including a setting for trial on July 15, 1966.

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and \$10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of \$10,000?

Defendant: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

.

Defendant: That's right, of my own volition, your Honor.

The Court: All right. Enter a pretrial investigation order and continue the matter until the 14th day of September. Same bond may stand.

On September 14, 1966, the case was called for disposition and the court asked defendant personally if he had "anything to say prior to the time that sentence is imposed?" He asked a similar question of defense counsel. The court heard their answers. Sentence was then imposed. The court also stayed execution for sixteen days.

1. Defendant's counsel urge that, because of three changes made in rule 11, Federal Rules of Criminal Procedure, *effective July 1, 1966*, the conviction of defendant on his plea of guilty herein should be reversed. First, they say that a judge is now *required* to address the defendant *personally*. Secondly, they say a judge is now required to "determine from his personal interrogation of defendant that he understands the consequences of the plea", and thirdly the court must determine that there is a factual basis for the plea. However, it is clear the district judge in this case had these recent changes in mind, as the contents of his remarks and questions to defendant indicated.

Counsel for appellant urge that defendant did not understand the nature of the charge against him. They base this upon defendant's own statement to the district judge when he was asked if he had anything to say prior to the imposing of sentence. The record shows that defendant then said:

"I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry."

They also rely on the fact that the probation officer informed the court that "defendant had become a member of Alcoholics Anonymous at approximately the time the guilty plea was entered" and that the court was also informed that defendant "is 66 years of age, who had been hospitalized at one time for alcoholism".

However, a complete answer to this contention is that the offense involved here refers to the filing of defendant's income tax return for the year 1960, which occurred on March 19, 1961, or about five years before sentencing which did not occur until 1966. On this appeal the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered—not some five and a half years before sentencing.

Under these facts, we hold that the district court satisfied the requirements of rule 11 in effect on and after July 1, 1966, in accepting defendant's plea of guilty. Cf. *United States v. Rizzo*, 7 Cir., 362 F. 2d 97, 99 (1966); and *United States v. Lowe*, 7 Cir., 367 F. 2d 44, 45 (1966). While these cases involved sentencing before July 1, 1966, we find their reasoning in substantial accord with the result we now reach in this case.

2. Next, defendant's counsel contend that the charges made against defendant were complicated and may well have been confused by defendant with lesser included offenses within § 7201, inasmuch as count II of the indictment charged violation of § 7201 of the Internal Revenue Code, by the filing of a "false and fraudulent income tax return". Defendant's counsel insist that such an allegation is undoubtedly quite common, since such an allegation would also form the basis for a violation of § 7207, which would amount to a misdemeanor. Further, they say, the existence of a tax deficiency "without more would amount to a misdemeanor, if it had been lodged under § 7203. . . ."

They cite *Sansone v. United States*, 380 U.S. 343 (1965) as indicating that the distinguishing characteristic of § 7201 is a willful attempt to evade or defeat taxes. Counsel then argue that the only statement appearing in the record concerning defendant's understanding the charge is that the defendant said "it is not deliberate". His counsel now argue that the legal force of such a statement is not clear and yet the court made no attempt to clarify the statement by further questioning of defendant.

The government in reply points out that the plea of guilty was to count II, which charged a violation of § 7201, and that a plea of guilty to a lesser included offense may not be accepted without consent of the government. *United States v. McCue*, 160 F. Supp. 595, 602 (D.C. Conn. 1958). The government argues, in essence, and we agree with it, that, under this record, a plea of guilty forecloses applicability of a lesser included offense. Certainly there is no confusion evident upon the record before us. Defendant was represented by able counsel when his plea was entered. He was not then entitled to plead to a lesser included offense. He did not plead to such an offense. The point seems to have arisen as an appellate proceeding afterthought.

3. Finally, defendant urges that the trial judge erred by ignoring the information presented at the sentencing hearing and thereby failed adequately to establish the full factual basis for the plea of guilty. In addition to rule 11, defendant argues that a second procedural safeguard had been set up to supplement the constitutionally guaranteed rights of defendant in criminal prosecutions. See 18 U.S.C.A. rule 32 (a) (1) amended effective July 1, 1966, which reads:

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. . . . Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

Counsel in their brief assert that the thrust of the amendment to rule 32 (a) (1) is the same as in the case of the amendment to rule 11. They say that the duties of the judge are indicated more clearly and that the amendment imposes an additional requirement that the judge address the defendant personally. Counsel for defendant admit that while the required hearing was held under the provisions of this rule, the information elicited "was ignored". We do not agree with the latter conclusion of counsel. The district judge observed the letter and spirit of the applicable provisions of the rules and gave proper weight to the substantial testimony presented and the facts otherwise shown to the court, as indicated herein.

The Notes of the Advisory Committee³ include the following:

"The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or *by examining the presentence report*, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." (Emphasis supplied.)

It appears by the words of defendant's trial counsel in this case that he was quite aware of the fact that there had been a very thorough presentence investigation made. He stated to the district court:

"I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—I don't know truly what I could add except to indicate that he is completely contrite."

Nevertheless defendant's counsel argue in their brief in this court:

"The conclusion is inescapable that the trial judge either failed to make a determination that a factual basis existed for a plea of guilty, or that he was in

³ Fed. Rules Cr. Proc., rule 11, 18 U.S.C.A., 4th paragraph of Notes

error in reaching an affirmative determination on that issue without additional facts to support his conclusion."

This attack upon the action of the district judge we cannot sustain, in view of the facts that he ordered a presentence investigation, which was admittedly thorough and extensive, and that there are circumstances apparent in this record indicating that the court read the presentence report and satisfied itself by that examination of the existence of a factual basis for the plea. For instance, in a colloquy with defense counsel, in connection with the imposition of sentence, when counsel argued that defendant "never took one single step to delude the investigating officer", the court remarked:

• • • • •

"Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent."

• • • • •

"I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the *manner in which the books were kept was not inadvertent.*" (Emphasis supplied.)

The court was of a similar opinion in another instance, a transaction involving a Blue Cross check. The court then expressed his views on the bookkeeping methods of defendant, information about which he could have obtained only from the presentence report, particularly about that check.⁴

We make the general observation that defendant was represented by retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty. See *United States v. Hetherington*, 7 Cir., 279 F. 2d 792 (1960), cert. denied 364 U.S. 908, where, at 795, we said, significantly: "The record shows that the defendant was represented by able counsel", and at 796, we said:

⁴ We note also that the government charges that defendant did not ask to examine his preinvestigation report nor did he make it a part of the record on this appeal.

“ . . . there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty.”

So it is in the case at bar.

For these reasons, the judgment from which this appeal was taken is affirmed.

JUDGMENT AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

JUDGMENT

(Caption omitted in printing)

Wednesday, January 10, 1968

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **AFFIRMED**, in accordance with the opinion of this Court filed this day.

ORDER DENYING REHEARING

(Caption omitted in printing)

Monday, February 5, 1968

It Is ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 1209—October Term, 1967

WILLIAM J. MCCARTHY,

Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

(Filed April 29, 1968)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APPENDIX D

AMENDMENT V

United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 26, UNITED STATES CODE § 7201

Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851:

TITLE 18, UNITED STATES CODE

*Federal Rules of Criminal Procedure, Rule 11
Pleas*

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty; and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.* As amended Feb. 28, 1966, eff. July 1, 1966.

[The portions of the Rule in italics are the additions to the Rule which constitute the Amendment of February 28, 1966 which became effective July 1, 1966.]

Respectfully submitted,

BARNABAS F. SEARS,
WAYLAND B. CEDARQUIST,
MAURICE J. MCCARTNEY,

Attorneys for Petitioner.

Supreme Court of the United States

No. 1209 ----- , October Term, 19 67

William J. McCarthy,

Petitioner,

v.

United States

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